

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

10001 cell;
25016

FILE: B-207688

DATE: May 3, 1983

MATTER OF: Tangfeldt Wood Products, Inc.

DIGEST:

1. Bid protest alleging that solicitation improperly excluded protester and its affiliates from competition is timely even though protest was filed in GAO at 12:19 p.m. and bids were opened at 10 a.m. that same day. There is a 3-hour time difference between location of bid opening (Eugene, Oregon) and location of GAO (Washington, D.C.). Therefore, protest was filed in our Office before bids were actually required to be submitted in accord with section 21.2(b)(1) of our Bid Protest Procedures.
2. Dispute between protester and contracting agency concerning whether protester was entitled to extension of contract is a matter of contract administration which is not for resolution by our Office.
3. Forest Service regulation (36 C.F.R. § 223.5(h)(1)), which excludes defaulted purchaser from bidding on resale of timber remaining under defaulted contract, unless Forest Service determines that allowing defaulted purchaser to bid is in public interest, is valid. GAO recommendation in B-195497, June 2, 1980, is modified in accord with Siller Brothers, Incorporated v. United States, 655 F.2d 1039 (Ct. Cl. 1981), cert. denied, 102 S. Ct. 1970 (1982).

Tangfeldt Wood Products, Inc. (Tangfeldt), protests its exclusion from participation in the Puff Resale Timber Sale by the United States Forest Service. Tangfeldt contends that it was not allowed to participate in the sale because the Forest Service wrongfully concluded that Tangfeldt had defaulted under a contract awarded by the Forest Service in connection with the original Puff Timber Sale. Tangfeldt

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argues that the Forest Service's automatic exclusion of Tangfeldt as a defaulted contractor amounted to a premature determination that Tangfeldt was nonresponsible and, since Tangfeldt is a small business, the matter of its responsibility should have been referred to the Small Business Administration (SBA) for review under certificate of competency procedures in accord with 15 U.S.C. § 637(b)(7) (Supp. IV, 1980).

The protest is denied.

When the oral auction for the original Puff Timber Sale was conducted, Tangfeldt was the highest bidder and was awarded the contract on December 9, 1980. Because much of the Puff Timber Sale included trees which had been damaged by fire and because fire damaged trees are highly susceptible to insect infestation, rotting, and windthrow, the Forest Service required that all timber harvesting operations be concluded by March 31, 1982. However, Tangfeldt requested a 2-year extension of its contract on January 19, 1982, in accord with the Forest Service Manual (Interim Directive No. 71, November 17, 1980). The Forest Service was willing to grant the requested extension contingent upon Tangfeldt agreeing, among other things, to a requirement that Tangfeldt cut and remove certain specified timber prior to July 15, 1982. Tangfeldt viewed the imposition of the priority removal requirement as unwarranted and impermissible and, therefore, objected. When Tangfeldt and the Forest Service could not agree upon a compromise date for removal of the specified timber, Tangfeldt concluded that the Forest Service had materially breached the contract because an extension was required under the Forest Service's own regulations. On the other hand, the Forest Service concluded that the priority removal schedule was justified and that Tangfeldt had materially breached the contract because by the contract's expiration date Tangfeldt had removed less than 70 percent of the timber which it was obligated to remove by March 31, 1982, under the terms of its contract.

In order to accomplish its original objectives and to calculate the damages it believed were due because of Tangfeldt's breach, the Forest Service reoffered the timber for sale. Under its own regulations, found at 36 C.F.R. § 223.5(h) (1982), the Forest Service had to determine whether to allow Tangfeldt, which the Forest Service considered to be in default of the Puff Timber Sale contractual obligations, to bid on the resale. The Forest Service regulations provide, in pertinent part, at 36 C.F.R. § 223.5(h)(1), that:

"(h)(1) Except as otherwise provided in this section, no bid will be considered in the resale of timber remaining from any uncompleted timber sale contract from any person, or from an affiliate of such person, who failed to complete the original contract: (i) Because of termination for purchaser's breach or (ii) through failure to cut designated timber on portions of the sale area by the termination date, unless acceptance of such bid is determined to be in the public interest."

The Forest Service concluded that Tangfeldt's participation would frustrate legally imposed limitations on contract extensions and, therefore, was not in the public interest. Accordingly, Tangfeldt was notified that it would not be allowed to participate in the resale.

The public advertisement of the resale, the timber sale prospectus and the Bid for Advertised Timber form all stated that bids from Tangfeldt and its affiliates would not be considered and required all bidders to sign a "Certificate of Nonaffiliation" to show that they were not Tangfeldt or affiliated with Tangfeldt since Tangfeldt was ineligible for the resale contract.

When the sale was conducted on May 28, 1982, Tangfeldt submitted a sealed bid in spite of the above notices that a bid from Tangfeldt would not be considered. Forest Service

officials advised Tangfeldt that its sealed bid would not be considered, and Tangfeldt was not allowed to participate in the oral auction which immediately followed submission of sealed bids. The oral auction was conducted without Tangfeldt and award made to Northwest Wood Products, Inc., the high bidder.

Tangfeldt filed its protest in our Office on May 28, 1982, at 12:19 p.m. Sealed bids were required to be submitted to the contracting activity no later than 10 a.m. on May 28. Under section 21.2(b)(1) of our Bid Protest Procedures (4 C.F.R. part 21 (1983)), a protest alleging improprieties apparent in the solicitation must be filed prior to bid opening. Since the contracting activity was located in Eugene, Oregon, and there is a 3-hour difference between the eastern and pacific time zones, Tangfeldt's protest was filed before the time set for submission of sealed bids. Accordingly, the protest is timely and will be considered on its merits.

Regarding the dispute between Tangfeldt and the Forest Service as to whether Tangfeldt was entitled to an automatic extension of its contract without inclusion of any priority removal requirement and whether Tangfeldt, the Forest Service, or both were in breach of their contractual obligations, we will not consider the merits of the issue because it involves a matter of contract administration and, therefore, is not appropriately for resolution as part of our bid protest function. See New England Telephone and Telegraph Company, 59 Comp. Gen. 746 (1980), 80-2 CPD 225. Therefore, without deciding which party was at fault, we will recognize that there was a dispute and take that fact into account in our consideration only insofar as it relates to the Forest Service's decision to exclude Tangfeldt from the competition for the resale.

The first issue raised by Tangfeldt calls for a determination of whether the Forest Service regulation (36 C.F.R. § 223.5(h)(1)), which allows the Forest Service to exclude a contractor which has breached or failed to complete a timber sale contract from the competition conducted for the resale of the remaining timber, is valid. We conclude that the regulation is proper and its use was justified in these circumstances.

Basically, Tangfeldt relies upon our decision in PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213, wherein we held that, when a contracting officer conducts a new competition to reprocore goods or services not delivered under a prior defaulted contract, the defaulted contractor has a right to compete for the reprocorement contract. We also held that automatic exclusion of the defaulted contractor would constitute an improper premature determination of nonresponsibility. Tangfeldt also cites our decision in B-195497, June 2, 1980, wherein we reviewed, at the Forest Service's request, the Forest Service regulation at issue. In that decision, we examined Forest Service arguments that resales of timber should not be subjected to the same rules as reprocorements and that the regulation in 36 C.F.R. § 223.5(h) represents a proper exercise of the Forest Service's authority in accord with the National Forest Management Act of 1976, as amended (16 U.S.C. § 472a (1976)). In B-195497, supra, we recommended that the Forest Service consider revising its regulations at 36 C.F.R. § 223.5(h) and corresponding sections of the Forest Service Manual to allow consideration of a defaulted purchaser's bid on a timber resale.

In spite of our recommendation in B-195497, supra, the Forest Service did not modify its regulations related to preventing a defaulted contractor from competing for the resale contract. The Forest Service has raised most of the same arguments in the present case that it raised in B-195497, supra. However, several new arguments have been presented.

The Forest Service contends that, if defaulted timber purchasers are allowed to bid on the resales, Forest Service management of the National Forest System will be negatively affected. In accord with 16 U.S.C. § 475 (1976), the Forest Service is charged with responsibility "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." To this end, the Forest Service has the authority to determine when a timber purchaser will be granted additional time to complete the timber sale contract. 16 U.S.C. § 472a(c) (1976). According to the Forest Service, the primary prerequisite to obtaining a contract extension is that the contractor must have performed diligently under the contract--a prerequisite which Tangfeldt did not meet. If Tangfeldt, or any other defaulted purchaser, is allowed to bid on the resale (in the

absence of any overriding public interest), then the Forest Service alleges its authority to determine whether contracts should be extended will be undermined and its ability to control such extensions diminished since award to a previously defaulted purchaser amounts to an extension of the original contract at potentially more favorable terms.

The Forest Service also argues that this particular resale was unusual in that removal of the remaining timber had to be accomplished very quickly. The Forest Service contends that the species of timber (western hemlock) which had been cut but not removed by Tangfeldt was subject to rapid deterioration due to "checking" (cracking at the ends of the logs). Checking would be particularly rapid because the logs were left in direct sunlight. We note that Tangfeldt strenuously disputes the Forest Service claim that checking would occur rapidly. Also, the Forest Service argues that since Tangfeldt had bid \$906.50 per thousand board feet for western hemlock which the Forest Service appraised at only \$24.56 per thousand board feet, Tangfeldt had an economic incentive not to remove the remaining timber. Again, Tangfeldt disputes the Forest Service's conclusion in this regard. From these arguments, it is clear that the Forest Service believed the resale to be urgent and doubted whether Tangfeldt would do the job quickly if awarded the resale contract.

The Forest Service also contends that, due to price fluctuations in the timber market, purchasers could use the default and resale procedure to speculate in hope of more favorable terms or higher market prices at the time of the resale. The Forest Service points out that the price bid for the western hemlock by Tangfeldt was 36 times higher than the appraised value and concludes that, perhaps because of market fluctuations, Tangfeldt may have had incentive not to harvest the timber.

In support of its position that the provisions of 36 C.F.R. § 223.5(h)(1) are legal, the Forest Service cites Siller Brothers, Incorporated v. United States, 655 F.2d 1039 (Ct. Cl. 1981), cert. denied, 102 S. Ct. 1970 (1982). In Siller Brothers, the United States Court of Claims (now United States Claims Court) upheld the validity of the Forest Service's regulation and held further that the Forest Service was not required to send a determination not to

allow a defaulted small business contractor to bid on the timber sale to the SBA for review under its certificate of competency procedures.

Tangfeldt urges our Office to either reject the holding of Siller Brothers or to consider the holding to be binding only in the unique situation where the original purchaser had not felled a single tree--the factual situation of the Siller Brothers case.

In PRB Uniforms, Inc., supra, we held that while the statutory requirement that contracts be let after competitive bidding is not applicable to reprocurments, once the contracting officer decides that it is appropriate to conduct a new competition for the reprocurement, he may not automatically exclude the defaulted contractor from that competition. Otherwise, such exclusion would constitute an improper premature determination of nonresponsibility. In our June 2, 1980, letter to the Forest Service (B-195497), we recognized that the procurement statutes and regulations which provided the basis for our decision in PRB Uniforms, Inc., do not apply to timber sales. Nevertheless, under 16 U.S.C. § 472a (from which the Secretary of Agriculture derives authority to sell timber), the Secretary of Agriculture is required to select bidding methods which "insure open and fair competition." We stated our opinion that automatic exclusion of a defaulted timber purchaser does not insure open and fair competition. We also opined that, in a resale of timber, the original purchaser's default should be only one factor to be considered in determining whether a contract should be awarded to that purchaser and, therefore, recommended that the Forest Service consider changing its regulations to allow consideration of a defaulted purchaser's bid on a timber resale.

In Siller Brothers, the court relied upon the fact that the purchaser had not cut a single tree over the 3-year period of its contract and, therefore, concluded that the Forest Service had no reason to think that the contractor would perform any better if it were awarded a second contract for the same timber. Implicit in the Forest Service's decision not to consider the original purchaser was a determination that it was not in the public interest to allow the original purchaser to bid on the resale. The Siller Brothers court held that such an implicit determination was in conformity with the provisions of 36 C.F.R. § 223.5(h)(1). Tangfeldt argues that this failure to cut a

single tree is a fact which makes the Siller Brothers case easily distinguishable from the present protest. We do not agree. The record shows that over one-half of the western hemlock (approximately 348,000 board feet), or about 28 percent of the total timber, though cut, was left decked in the sale area. Since Tangfeldt's price for this type of timber was so high and because Tangfeldt did not remove such a high proportion of the western hemlock, we believe that there was justification for the Forest Service's fear that Tangfeldt would again fail to complete the contract in a timely fashion if it were awarded the resale contract. In any event, we find that there are no major distinguishing factors between the present case and the situation presented to the court in Siller Brothers.

In Siller Brothers, the court considered our PRB Uniforms, Inc., rule and even noted our recommendation in B-195497 that the Forest Service consider changing its regulations concerning bids from defaulted purchasers. The court stated that:

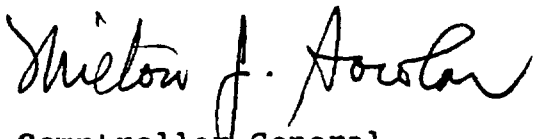
"Since the Forest Service's regulation permits a defaulting contractor to rebid if the Service determines that acceptance of his bid would be in the public interest, the Comptroller General might uphold the exclusion of [the defaulted bidder] from rebidding in this case."

The court concluded that the Forest Service's regulation was valid and did not violate the Government's duty to mitigate damages due to the default. Furthermore, the Siller Brothers court held that the provisions of 15 U.S.C. § 637(b)(7)(A) (Supp. I, 1977), which granted the SBA conclusive authority to determine whether small businesses are responsible in sales of Government property, did not mandate referral of exclusion of a small business bidder (because of default in accord with 36 C.F.R. § 223.5(h)(1)) to the SBA. The court stated that the Forest Service regulation did not discriminate against small business bidders and, therefore, the 1977 amendments to the Small Business Act were not intended to cover the situation of the reletting of a contract after a small business purchaser had defaulted in performance.

In view of the Siller Brothers holding, we herein modify our recommendation in B-195497 so that where, as here, a sale of Government property by an oral auction process is involved, defaulted bidders may be barred from participating. However, we believe it is essential that in other circumstances, bids by defaulted purchasers be allowed where the public interest will be better served. In this case, the Forest Service regulation contained such a provision.

Even though Tangfeldt was never terminated for default, the regulation did not require such action; all that was required is that the resale was because of the failure of Tangfeldt to complete the original contract by the termination date. We find that the Forest Service properly applied the regulation because Tangfeldt had not removed a considerable amount of timber and because, in the Forest Service's view, that timber was very likely to deteriorate rapidly. We also conclude that, in view of the express finding in Siller Brothers, that 15 U.S.C. § 637(b)(7)(A) did not cover this situation, referral to the SBA for certificate of competency review was not required.

Accordingly, the protest is denied.

for 
Comptroller General
of the United States